

Protest of)	Date: June 29, 1987
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BOILER, PRESSURE VESSELS)	
INSPECTION AGENCY, INC.)	
)	
Solicitation Nos. 269986-87-A-0052,)	P.S. Protest No. 87-17
269986-87-A-0053,)	
269986-87-A-0054 and)	
269986-87-A-0055)	

DECISION

Boiler, Pressure Vessels Inspection Agency, Inc., (BPV) timely protests the terms of Solicitation Nos. 269986-87-A-0052, 269986-87-A-0053, 269986-87-A-0054, and 269986-87-A-0055. BPV claims that the terms of each solicitation are unduly restrictive of competition and discriminate against small businesses. BPV requests an amendment to the solicitations that will enable it to bid.

Invitations for Bids (IFB) Nos. 269986-87-A-0052 through 269986-87-A-55, issued January 17, 1987, by the Facilities Service Office, Bloomington, MN, sought bids for inspections of boilers and unfired pressure vessels at various postal facilities. Bid openings for the solicitations were scheduled for February 26 and 27. However, by letter dated February 25, BPV protested the terms of all four solicitations.^{1/}

BPV alleges that paragraph 6.1, "Qualification of Contractors" (requiring the contractor to have in its employ a full time staff of inspectors) and 6.2, "Qualifications of Inspectors" (requiring each inspector to be commissioned by the National Board of Boiler and Pressure Vessel Inspectors (NBBPVI)) exclude small businesses and unduly restrict competition. BPV also argues that an amendment to paragraph two of the "Scope of Work" of the contract, which provides, "The U.S. Postal Service may furnish some of the required inspections with its own work force, but it will order from the contractor all the inspections which exceed the U.S. Postal Service capabilities," must be clarified. BPV asserts the lack of specificity makes it difficult for a contractor to determine the volume of work to be performed.

In her report to this office, the contracting officer states that the requirement that

^{1/}The contracting officer stated that since only a telegram was initially sent protesting the terms of the solicitation, she thought there was neither enough information or time to warrant postponing the bid opening. Therefore, the contracting officer opened all bids at the scheduled time.

inspectors be commissioned by the NBBPVI was designed to promote safety and to comply with inspection codes and standards. The contracting officer contends that Postal Service inspection standards must be maintained when inspections are not conducted by Postal Service employees. She asserts that this objective can be achieved by using inspectors commissioned by the NBBPVI; in order to be commissioned by the NBBPVI, inspectors must be currently and actively employed by the bidder. Moreover, inspectors must pass a NBBPVI written examination.

The contracting officer knows of no other independent licensing organizations for boiler and pressure vessels inspectors. Therefore, she asserts that, although the requirement excludes some contractors, it ensures that inspectors are qualified, practicing, and knowledgeable as to both current inspection practices and changes in the American Society of Mechanical Engineers Boiler and Pressure Vessel Code. Thus, the contracting officer concludes that requiring an inspector to be commissioned is a reasonable procedure for making sure that services procured meet the Postal Service's minimum needs. In addition, the contracting officer argues that full time inspectors are required to meet anticipated workloads.

Discussion

Our standard of review for challenges to the terms of a solicitation is as follows:

The determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43; accord, Action Enterprises, Inc. and American Vending, Inc., P.S. Protest Nos. 87-14, 87-15, March 13, 1987.

The contracting officer has provided prima facie support for the requirement that inspectors be commissioned by the NBBPVI to ensure the safety of Postal Service employees and to comply with inspection standards and codes. BPV has not demonstrated that this determination is unreasonable and this office finds no basis to set it aside. The contracting officer may require that inspectors be certified in order to maintain the same inspection standards that are applied by Postal Service inspectors. The absence of such experience and certification could give rise to the reasonable concern, implicit in the contracting officer's position, that inadequate safety inspections may result in an unsafe working environment.

In view of the highly technical nature of the work P of inspecting boilers and unfired pressure vessels, the contracting officer reasonably concluded that inspectors should be tested and certified for competency. Such determinations will not be reversed unless they are arbitrary or unreasonable. Baker Masterlift, Inc., S. Protest No. 86-21, April 18, 1986. BPV has failed to demonstrate that the contracting officer has improperly determined the minimum needs of the Postal Service.

We reach a different result with the requirement that a contractor only employ full-time inspectors. The contracting officer considers this requirement necessary to ensure that safety and compliance standards are met, but the contracting officer has not established prima facie support for her contention that the restriction is reasonably related to the Postal Service's needs. The contracting officer has presented no evidence or analysis to support her assertion; instead, her rationale for the requirement is conclusory: "Attempting to maintain an inspection program with insufficient manpower is an early invitation to nonperformance which could jeopardize safety." Accordingly, the contracting officer has not presented a reasonable basis for the requirement; it overstates the Postal Service's minimum needs.

We agree with BPV that the amendment pertaining to projected workloads should be clarified as its purpose is not clear. If the purpose is to create a form of indefinite quantities contract between the Postal Service and offeror, it fails. An indefinite quantities contract is a contract under which the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from the seller. In an indefinite quantities contract without a guaranteed minimum quantity term, the buyer's promise is illusory and the contract

unenforceable against the seller. Willard, Sutherland & Co. v. United States, 262 U.S. 489, 493 (1923); Mason v. United States, 222 Ct. Cl. 436, 443 (1980); Gavin, Government Requirements Contracts, Pub. Cont. L.J. 234, 240-44 (1972). Postal regulations require that a minimum purchase be included in indefinite quantities contracts. Postal Contracting Manual (PCM) 3-409.3. Without a guaranteed minimum quantity term, the Postal Service could order nothing, rendering its obligations illusory; therefore, the contractor's obligation would be unenforceable.

If the contract resulting from the solicitation is intended to be a requirements^{1/} contract, the amendment is confusing. Requirements contracts should include good faith estimates of the quantity of services to be delivered. Gavin, Government Requirements Contracts, supra; PCM 7-1102.2 (a), (b) (1). It is not clear whether the language in Amendment A-01 is intended to modify the estimate of the number of inspections set forth in the original solicitation, and, therefore, bidders are not told of the amount of work they should expect. Thus, the ambiguity of the amendment raises questions as to the type of contract and the amount of work contemplated by the solicitation.

We find, given the circumstances (terms in the solicitation that overstate the Postal Service's minimum needs, and a confusing amendment), that the solicitation is unduly restrictive of competition. Because bids have been opened for this project, the contracting officer is directed to cancel the solicitations and issue new solicitations in accordance with this decision.

The protest is sustained in part and denied in part.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 2/23/93 WJJ]

^{2/}While requirements contracts also lack a promise from the buyer to order a specific amount, consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts are clearly enforceable on that basis. See Brawley v. United States, 96 U.S. 168, 172 (1878); Shader Contractors, Inc. v. United States, 276 F.2d 1, 4-6 (Ct. Cl. 1960).